STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 16, 2010

Mr. Greg Bowes
Marion County Assessor
200 E. Washington St.
Suite 1360
Indianapolis, IN 46204-3321

Re: Informal Inquiry 10-INF-6; Commercial Use of Electronically Stored Public Records

Dear Mr. Bowes:

This is in response to your informal inquiry regarding the records of your office, the Marion County Assessor ("Assessor"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-1 *et seq*.

You seek my opinion regarding a recent request for public records and the propriety of using public information for commercial purposes. The Assessor produced the records to the requester by attaching a spreadsheet file to an email. Marion County has enacted an ordinance under I.C. § 5-15-3-3(e) restricting the use of electronically stored public data. Indpls. Code § 285-311. You ask whether the fact that the information was submitted via email -- as opposed to by "disk or tape" under section 3 of the APRA -- changes the effect of the restrictions anticipated by the ordinance. On a related note, you ask whether the Assessor would be able to refuse further requests for electronic information if the recipient of the request uses it for commercial purposes if it was transmitted via email. Your view is that, under the spirit of the statute, email transmission should be treated the same as if the information were transmitted by disk or tape.

I agree with your interpretation of section 3 of the APRA. The relevant portion of the statute reads:

> [A] public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum or any other method

> of electronic retrieval if the medium requested is compatible with the agency's data storage system. I.C. § 5-14-3-3.
>
> * * *
>
> A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. . . .

I.C. §§ 5-14-3-3(d), (e).

There is some precedent for this office to consider electronically stored records that are delivered via email as "information on disk or tape" within the meaning of subsection 3(e). In *Opinion of the Public Access Counselor 07-FC-163*, Counselor Neal considered the effect of section 3 of the APRA on information that was requested "in an electronic format (via 4mm, DAT, CD-ROM, email or FTP)." *Id.* at 3. In that opinion, Counselor Neal concluded that the public agency was "within its statutory authority [under subsection 3(d) of the APRA] in denying a copy of the information ***in electronic format*** if it can prove [the requester] would use this information in a manner contrary to the [agency's locally enacted] resolution." *Id.* at 4 (emphasis added). Counselor Neal apparently did not deem it necessary to subdivide the requested format into those on "disk or tape" and those produced by other means. I see no reason to distinguish information transmitted via email from "information on disk or tape" either. This interpretation seems to effectuate the purpose of subsections 3(d) and (e), which is to permit state and local agencies to enact rules prescribing the conditions under which electronically stored records and information may or may not be used for commercial purposes. If we were to consider only that information that is transmitted by "disk or tape" as subject to these subsections, their legal effect would be negated with each technological advance in electronically stored data. In my opinion, that would run contrary to the General Assembly's intent.

As to your other question regarding a requester that violates Indpls. Code § 285-311, the APRA provides that a person who uses information in a manner contrary to a rule or ordinance adopted under subsection 3(e) may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d). I.C. § 5-14-3-3(e). Thus, the Assessor acts is within its statutory authority if it denies access to information in electronic format if it can prove the requester has previously used information in a manner contrary to the resolution. *Id.; see also Opinion of the Public Access Counselor 07-FC-163*.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Andrew J. Kossack
Public Access Counselor